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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANCISCO ALVAREZ CAMORLINGA,

Defendant and Appellant.

F067628

(Super. Ct. No. BF126096A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. John W. Lua and John R. Brownlee, Judges.

Robert Navarro, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez and Charity S. Whitney, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Gomes, Acting P.J., Kane, J. and Smith, J.

Defendant Francisco Alvarez Camorlinga was charged with three counts of committing a lewd act upon a child (Pen. Code, § 288, subd. (a)). A jury convicted him of only one count. The trial court sentenced him to six years in prison. On appeal, he contends the trial court violated his right to a unanimous verdict and abused its discretion by instructing the jurors to continue deliberating. We affirm.

DISCUSSION

I. Background

Judge Lua presided over the trial. Evidence was presented on April 29, April 30, May 1, and May 2.¹ The jury retired to deliberate at about 11:24 a.m. on May 2.

On Friday, May 3, Judge Brownlee substituted in for Judge Lua. At the beginning of the morning session, he stated the following:

“Let the record reflect that this morning at 9:55, we received a note from the jury in this matter. It is now 10:41. The note reads, ‘We appear to be deadlocked on all three counts,’ signed by the foreperson, who went ahead and gave the numerical disbursement of the vote. I did have a chance to speak to counsel at sidebar prior to taking the bench to get some information on the case.

“It is my understanding that the jury received the case shortly before noon yesterday, around 11:30. They were off 12:00 to 1:30 for lunch, came back at 1:30. Judge Lua sent them home early at the jury’s request, and then during that time that they were in session yesterday deliberating between 1:30 and 4:00, they had an hour’s worth of readback. They then brought this note back this morning at 9:55. I assume that they were sent back into the jury room at 9:00. So they really haven’t deliberated very long at all. My observation is that they’ve had maybe four hours of deliberation and less than that if you take into account that there was an hour of readback from the victim. [¶] So I would be inclined to bring the jury in and ask them how many ballots have been taken and then tell them to continue their deliberations.”

Over defense counsel’s objection, the court called the jury back. The court asked the foreman how many ballots the jurors had taken. The foreman answered they had

¹ All dates refer to 2013.

taken three or four ballots on each of the charges. They had left the prior evening at 4:00 p.m. because they thought they needed to sleep on the matter. When they came back in the morning, nothing much had changed. The court summarized that the jury had deliberated a total of about three hours—two hours on the prior day and about one hour on this day. The court instructed the jurors as follows:

“What I am going to do is I need you to continue to deliberate. After all of the evidence and testimony you’ve heard, I think at this point you need to continue to work on the matter. So I am going to send you back into the jury room. Remember the law, apply the law to the facts, and do your best to reach a decision. Thank you very much.”

The jurors left and resumed deliberations at 10:50 a.m. At noon, the jury was released for the evening and ordered to return at 9:00 a.m. on Monday.

On Monday morning, May 6, Judge Lua was back in court. Defense counsel submitted a motion to dismiss based on jury coercion. The court stated the jury had reached a verdict. The jury returned and informed the court it had in fact reached a verdict on Friday at 11:50 or 11:55 a.m. The jury found defendant guilty on one count and not guilty on two counts. The court denied defendant’s motion to dismiss.

II. Analysis

Defendant contends “the trial court erred in failing to declare a mistrial because it was unfamiliar with the case and did not accurately learn the actual length of the trial and testimony, ... failed to inquire whether the jurors were agreeable that further deliberations would be helpful, and did not express any assurances that it was not seeking a particular outcome or that independent jurors need not acquiesce to reach a decision.”

Penal Code section 1140 provides: “Except as provided by law, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, unless by consent of both parties, entered upon the minutes, or unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree.”

“‘The determination whether there is reasonable probability of agreement rests in the discretion of the trial court. [Citations.] The court must exercise its power, however, without coercion of the jury, so as to avoid displacing the jury’s independent judgment ‘in favor of considerations of compromise and expediency.’ [Citation.]’ [Citation.] The question of coercion is necessarily dependent on the facts and circumstances of each case.” (*People v. Sandoval* (1992) 4 Cal.4th 155, 195-196; *People v. Debose* (2014) 59 Cal.4th 177, 209 [trial court has the discretion to determine whether to declare a hung jury or order further deliberations].)

In the recent case of *People v. Bryant* (2014) 60 Cal.4th 335 (*Bryant*), the Supreme Court explained that under *People v. Gainer* (1977) 19 Cal.3d 835, “‘coercive’ actions are those involving ‘a judicial attempt to inject illegitimate considerations into the jury debates [and] ... appeal to dissenting jurors to abandon their own independent judgment of the case against the accused,’ by placing ‘excessive pressure on the dissenting jurors to acquiesce in a verdict.’ [Citation.] In assessing the effect of the trial court’s actions, the question is ‘whether the instructions tend[ed] to impose such pressure on jurors to reach a verdict that we are uncertain of the accuracy and integrity of the jury’s stated conclusion. This determination of whether the instructions “operate[d] to displace the independent judgment of the jury in favor of considerations of compromise and expediency” [citation] is perhaps best characterized as requiring a generalized assessment of the potential effect of a given instruction on the fact finding process, rather than as an attempted inquiry into the actual volitional quality of a particular jury verdict.’ [Citation.] [¶] In *Gainer*, the court gave a lengthy instruction encouraging a unanimous verdict. It advised the jurors to “‘consider that the case must at some time be decided, that you are selected in the same manner and from the same source from which any future jury must be selected, and there is no reason to suppose the case will ever be submitted to twelve men or women more intelligent, more impartial or more competent to decide it, or that more or clearer evidence will be produced on the one side or the other.’” [Citation.]

Further, the instruction told the minority jurors to evaluate the reasonableness of their position in light of the fact that the majority had not been convinced by it.” (*Bryant, supra*, 60 Cal.4th at pp. 460-461, fn. omitted.)

In this case, the presentation of evidence spanned four days and included about five hours of testimony. After three hours of deliberation, the jurors informed the court they were deadlocked. The numerical division of votes, written on the foreman’s note, was six to six on count 1, five not guilty to seven guilty on count 2, and two not guilty to 10 guilty on count 3. After the court instructed the jurors to continue deliberating, they reached a verdict in about one hour, finding defendant not guilty on counts 1 and 2, and guilty on count 3.

Much of defendant’s argument is based on conjecture that finds no basis in the record. He claims Judge Brownlee, as a visiting judge, did not have accurate information about the trial; the jurors wanted to finish deliberations before the weekend; and the jurors did not engage in meaningful deliberations after the court’s instruction to continue deliberating. We will not question the trial court’s exercise of discretion on the basis of these imagined possibilities.

The trial court’s instruction to the jury that it should continue to work on the matter, apply the law to the facts, and do its best to reach a decision was in no way coercive. The instruction did not inject illegitimate considerations, appeal to dissenting jurors to abandon their judgment, or place excessive pressure on the dissenting jurors to acquiesce in a verdict. (See *Bryant, supra*, 60 Cal.4th at pp. 460-461.) The court simply concluded that after only three hours of deliberations, the jury might not truly be deadlocked and might benefit from further deliberations. In doing so, the court was not required to question the jury about the impasse. (See *People v. Moore* (2002) 96 Cal.App.4th 1105, 1122 (*Moore*).) Under these circumstances, it was well within the court’s discretion to direct the jury to deliberate further. (See *id.* at p. 1121.) As it turned

out, further deliberations resulted in one guilty verdict and two not guilty verdicts, suggesting the dissenting jurors did not feel pressured to convict defendant on all counts.

As the *Moore* court explained: “Contrary to defendant’s argument on appeal, the jury was never directed that it was required to reach a verdict, nor were any constraints placed on any individual juror’s responsibility to weigh and consider all the evidence presented at trial. The trial court also made no remarks either urging a verdict be reached or indicating possible reprisals for failure to reach an agreement. In short, it is clear the trial court took great care in exercising its power ‘without coercing the jury into abdicating its independent judgment in favor of considerations of compromise and expediency.... Nothing in the trial court’s comment in the present case properly may be construed as an attempt to pressure the jury to reach a verdict’” (*Moore, supra*, 96 Cal.App.4th at p. 1121.)

DISPOSITION

The judgment is affirmed.